United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2181. 747

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER, AND NELLIE MONTGOMERY, APPELLANTS,

vs.

W. GWYNN GARDINER, ADMINISTRATOR, *CUM TESTAMENTO ANNEXO*, OF THE ESTATE OF JANE E. KICKHAM, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 14, 1910.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1910.

In the Court of Appeals of the District of Columbia.

No. 2181.

JAMES SMITH et al., Appellants,
vs.
W. GWYNN GARDINER, Administrator, &c.

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a Supreme Court of the District of Columbia.

Equity. No. 27603.

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER and NELLIE MONTGOMERY, Complainants,
vs.
W. GWYNN GARDINER, Admr., Cum Testamento Annexo, of the Estate of Jane E. Kickham, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Amended Bill of Complaint.*

Filed Nov. 15, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 27603.

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER and NELLIE MONTGOMERY, Complainants,
vs.
W. GWYNN GARDINER, Admr., Cum Testamento Annexo, of the Estate of Jane E. Kickham, Dec., Defendant.

Come now your complainants and with the leave of the Court first had and obtained file this their amended bill of Complaint and represent:

1st. That they are adult citizens of the United States and residents of the District of Columbia, and bring this suit in their own right and that the defendant is likewise an adult citizen of the United States, resident of the District of Columbia, and is sued as the administrator with the will annexed of the estate of Jane E. Kickham, late citizen of the United States and a resident of the District of Columbia.

2nd. That the said Jane E. Kickham departed this life on or about the 24th day of July, A. D. 1906, leaving a last will and testament which has been duly admitted to probate and record in the Probate Court of the Supreme Court of the District of Columbia,
under which last will and testament your complainants were
2 nominated as residuary legatees, among others.

3rd. That the decedent left an estate consisting of personal property situate in the District of Columbia of the value of $6,000, and real estate to the value of $1500 which under the terms of the will — sold and converted to personal property to be distributed to the legatees named in the will.

4th. That your petitioners are advised and believe that the defendant named herein in his official capacity, as aforesaid, is about to pay over large sums of money belonging to the estate and payable to your complainants on account of numerous, void bequeaths attempted to be made by the testatrix under the will hereinbefore mentioned, a copy of which is hereto annexed and prayed to be read as a part hereof.

5th. That the attempted bequeath made in the second item of said will wherein the testatrix seeks to give, devise and bequeath to James Gibbons, Cardinal and Arch Bishop of Baltimore City, Md., all of her share of said stock in the Georgetown Gas-Light Company for the use and benefit of the Roman Catholic Church in his Arch Bishopry, is void by reason of the fact primarily that it is not sufficiently descriptive to make it certain and definite. For the further reasons that a trust is attempted to be created making an absolute grant and an attempt made to designate a trustee without naming a successor; without any showing of an acceptance of the trust by the trustee; without any provision being made for the distribution of the
fund in question in case of a failure on the part of the said
3 trustee to make distribution in his life time and without the
authority vested in any person or persons to demand an accounting from said trustee. For the further reason that the trust is so indefinite that the Court would be without power to direct or declare a distribution or disposition of the proceeds sought to be intrusted in event of the refusal of said Gibbons to accept the trust or upon his failure to distribute the fund during his life time. For the further reason that the said bequeath is wholly uncertain and indefinite as to whom the beneficiaries thereunder are, there being no designation as to what specific Catholic Church or Churches is nominated as the beneficiary or what proportion of the proceeds the various institutions designated as Catholic Churches should receive or whether the trust is to James Gibbons, Cardinal, or to James Gib-

bons in his private capacity, or as trustee for certain purposes which were not defined. For the further reason that the Court would have no power to distribute the fund or make any disposition thereof in the event of the death of the said trustee prior to distribution by him or in event of his refusal to act as trustee.

6th. That the 3rd and 7th items of the will are likewise void, the contention of complainants being that they fall within the category of bequeath made in item 2 and are subject to the same objections as are set forth respecting item 2 of the will herein referred to.

7th. Your petitioners abandon their contentions as to the validity of the bequeaths made in items 4, 5, and 6 of decedent's will and make no contention respecting said items.

4 8th. Your complainants likewise aver that a construction of item 12 of said will is essential in order to determine who the proper residuary legatees are and to establish their status in reference to the funds if any remaining over after the payment of the specific legatees.

9th. Your complainants are advised and believe and therefore aver that as residuary legatees they are entitled to the proceeds in the hands of the defendant which are attempted to be devised under items 2, 3 & 7 of the will of decedent.

Wherefore the premises considered your complainants pray;

1st. That the defendant be directed by writ from this court to appear and answer the exigencies of this, complainants' amended bill.

2nd. That the defendant be enjoined and restrained from paying out any of the legacies mentioned in items 2, 3 & 7 of the will to any person or persons other than the complainants herein until the further order of the Court.

3rd. That the bequeaths mentioned in items 2, 3 & 7 be declared void and of no effect.

4th. That upon final hearing this cause be referred to the auditor of the Supreme Court of the District of Columbia to determine the respective interests of your complainants.

5th. For such other and general relief as to the Court may seem proper and the nature of the cause demands.

JAMES SMITH,
FRANCES ULLMER,
JAMES ULLMER,
NELLIE MONTGOMERY,
By WM. E. AMBROSE,
Solicitor.

WM. E. AMBROSE,
For Compl't.

5 DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that those facts stated of my own knowledge are true and those stated upon information and belief I believe to be true.

WM. E. AMBROSE.

Subscribed and sworn to before me this 15th day of November, A. D., 1909.

[SEAL.] THEODORE BLOCK,
Notary Public, D. C.

6 EXHIBIT.

Filed Feb. 10, 1910.

I, Jane E. Kickham, of that part of Washington City formerly called Georgetown, in the District of Columbia, being of sound and disposing mind, but knowing the uncertainty of the time of death, especially at my advanced age and having no known blood relations and being desirous to prepare my worldly estate for the event of my decease, whenever it may please God to call me hence, do therefore make and publish this as my last Will and testament, in manner and form following, that is to say:

First. I commit my soul into the hands of Almighty God, and my body to the earth to be decently buried at the discretion of my Executor hereinafter named. I direct all my just debts, which will be but a small sum, to be paid by my executor in a lawful time after my decease.

Second. I give and devise and bequeath to James Gibbons, Cardinal, and Archbishop of Baltimore City, Maryland, all my shares of Stock in the Georgetown Gas Light Company, for the use and benefit of the Roman Catholic Church, in his Archbishopric*k*.

Third. I also give and bequeath to said Cardinal Gibbons, five hundred dollars for the use and benefit of St. Charles' College, in said [Baltimore]* Maryland, and near Ellicott's City. Said College belongs to said Roman Catholic Church or denomiantion.

Fourth. I give and bequeath to St. Vincent's Orphan Asy-
7 lum, as popularly called, of said Washington City, and which Asylum was Incorporated by Act of Congress approved on or about 25th February, 1831, to said Asylum or corporation, three hundred dollars, for its use and benefit.

Fifth. I give and bequeath to St. Joseph's Orphan Asylum, or by whatever corporate name said institution may be designated, in said Washington City, five hundred dollars, for said Institution's use and benefit.

Sixth. I give and bequeath to the institution popularly called the "House of the Good Shepherd," however it may be incorporated, in said Georgetown, D. C., Five Hundred Dollars for the use and benefit of said institution.

Seventh. I give and bequeath to said Cardinal Gibbons, as Archbishop, and to his successors in said office, Five hundred dollars, for the use and benefit of the Roman Catholic Trinity Church in said Georgetown, as formerly called, in said District.

Eighth. I give and bequeath to the "Aged Women's Home," as called, in said Georgetown, and on 32nd or High Street, One hundred dollars, for the use and benefit of said Institution.

[* Word enclosed in brackets erased in copy.]

Ninth. I give and bequeath to Francis Ullmer, two hundred dollars. Also to James Ullmer, one hundred dollars. And to Jane Ullmer, one hundred dollars. The three persons just named are the children of Rudolph and Mary Ann Ullmer, said Mary being formerly Mary Ann McCarthy. She was provided for, with her children, also in the will of my deceased husband, William Kickham, whose Will is Recorded in Will Book numbered 31, page 486, in said District.

8 Tenth. I also give and bequeath to Nellie Montgomery, formerly Nellie Walton, and who has waited much on me, One hundred dollars, with my safe, and a bed and bedding out of my furniture.

Eleventh. I empower and authorize my friend, hereinafter named as Executor, namely, [Maurice]* Maurice J. Adler, of said Georgetown, or whoever may be lawfully authorized in his place, to sell all and any part of the real estate I may own at my death, and at public or private sale, and so as to make a fair sale thereof, and on payment or proper securing of the purchase money for the place or places sold to convey such place or places in fee-simple title to the purchaser or purchasers thereof, who shall not be required to see to the application of said purchase money.

Said real estate shall be sold as soon as can be reasonably done after my decease. The rents from such real estate after my death, and before so selling, shall be collected by said Executor, and after deducting any expenses necessary about said real estate, shall be used *a* part of my estate. The money or sums of money arising from such sale or sales, shall be applied by my said Executor in payment, as far as needed, of the various bequests made in this my Will.

Twelfth. All the remainder of my estate I direct my said Executor, Maurice J. Adler, to divide among such of the legatees and beneficiaries hereinbefore named as can lawfully receive any share of such, such beneficiaries or legatees to take in the proportions which the specific sums hereinbefore given them bear to each other,

9 and such additional shares to be given to said beneficiaries in the same manner and estate as said specific sums are given.

And I authorize my said Executor to sell all or any part of my personal estate, necessary and proper to be sold for the payments and gifts herein made, and to collect all money due me or my estate for the said payments and gifts.

The bequests in part "Ninth" of this Will shall be invested when paid over in some safe way at interest until the several beneficiaries named in said part are severally of age.

Thirteenth. I appoint said Maurice J. Adler as Executor of [of]* this my last Will and testament, and hereby revoke any and all Wills by me hitherto made, making this to be my last Will solely.

All money paid over by my said Executor for the beneficiaries in part "Ninth" of this Will, shall be safely invested in some way for them, until the majority of each one.

[* Word enclosed in brackets erased in copy.]

In Testimony of all the foregoing, and hereto annexed, I have hereunto set my hand and seal this Eighth (8) day of March, in the year of our Lord 1898.

JANE E. KICKHAM. [SEAL.]

Signed, sealed, published and declared by the above named testatrix, Jane E. Kickham, as and for her last Will and testament in the presence of us, who, at her request, in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

WILLIAM CLAUDE BARRETT.
RICHARD S. BALINGER.
CLIFTON P. ASH.

10 *Answer of W. Gwynn Gardiner.*

Filed Dec. 9, 1909.

Equity. No. 27603.

JAMES SMITH et al.
vs.
W. GWYNN GARDINER, Administrator c. t. a. of the Estate of Jane E. Kickham, Deceased.

This respondent now and at all times hereafter saving and reserving to himself all manner of benefit of exception by demurrer or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the amended Bill of Complaint contained, for answer thereto, or to so much as this respondent is advised it is material or necessary for him to make answer unto, answering says:

1, 2, & 3. This respondent admits as true the allegations contained in the first three paragraphs of said Bill.

4. In answer to paragraph four this respondent says that he is anxious to pay over to the legatees the legacies respectively bequeathed to them and each of them under the Will of the said Jane E. Kickham, deceased, but has not paid over several of said legacies by reason of the contention of the complainants.

Further answering said paragraph this respondent denies that any of said bequests made by the testatrix in her Will are
11 void.

5. In answer to paragraph five this respondent denies that the bequest made to James Gibbons, Cardinal, and Archbishop of Baltimore City, Maryland, under the second item of the last Will and Testament of Jane E. Kickham, deceased, is void for the reasons stated by complainants in said paragraph, or for any other reasons; but on the contrary respondent says that the bequest is certain and definite and absolutely valid as a charitable trust under the laws in

force in the District of Columbia; that as to the trust created in said paragraph, as alleged by said complainants, if any is created, a Court of equity will not permit the same to fail for the want of a trustee, or for the failure of the testatrix to name a successor to the Trustee, or by reason of the refusal of the named trustee to accept the same; and a Court of Equity will entertain a bill of equity for an accounting by any person or persons interested in said fund.

6. In answer to paragraph six of said amended Bill of Complaint, respondent denies that items three and seven of the said last Will of Jane E. Kickham, deceased, are void for the reasons stated in said paragraphs five and six, or for any other reasons, but on the contrary says that the bequests contained in items three and seven are definite and certain, and absolutely valid under the laws of the District of Columbia.

7. In answer to paragraph seven respondent admits that the complainants have advised him since the filing of their original
12 bill of their abandonment of the contention as to the invalidity of the bequests contained in items four, five and six of said last Will and Testament, and concedes that said bequests contained in said items four, five and six are valid.

8. Respondent in answer to paragraph eight of said amended Bill denies "that a construction of item twelve of said Will is essential in order to determine who the proper residuary legatees are and to establish their status and reference to the funds if any remaining over after the payment of the specific legacies;" but on the contrary says that in the event there is any balance left over after the payment of all the specific legacies bequeathed under said Will, that item twelve of said Will is sufficiently clear as to the parties who will take and the proportions of any such balance.

9. In answer to paragraph nine this respondent denies that the complainants as residuary legatees or otherwise are entitled to the fund in his hands, which have been bequeathed under items two, three and seven of the said last Will, but on the contrary says that the legatees named in said items two, three and seven are entitled to receive said bequests.

And now having fully answered this respondent prays to be hence dismissed with his reasonable costs.

W. GWYNN GARDINER,
Administrator c. t. a. of the Estate of
Jane E. Kickham, Deceased.

DISTRICT OF COLUMBIA, *ss:*

W. Gwynn Gardiner, being first duly sworn according to
13 law, upon oath deposes and says that he is the administrator of the estate of Jane E. Kickham, deceased, and that he has read the foregoing Answer to the amended Bill of Complaint by him subscribed; that the matters and things therein stated upon his personal knowledge are true, and those things stated upon information and belief, he believes to be true.

W. GWYNN GARDINER.

Subscribed and sworn to before me this 9th day of December, A. D., 1909.

[SEAL.] JENNIE M. SHEFFER,
Notary Public, D. C.

Decree Construing Will.

Filed Mar. 11, 1910.

This cause coming on to be heard upon the Bill and Answer and other papers, and being argued by counsel and submitted to the Court, and the Court being of the opinion that the bequests contained in paragraphs two, three and seven of the last Will and Testament of Jane E. Kickham, deceased, are certain and definite, and that James Gibbons, takes said bequests as trustee in his official capacity as Cardinal and Archbishop, it is therefore, this Eleventh day of March, A. D. 1910, by the Court adjudged, ordered and decreed as follows:

14 First. That the bequests contained in paragraphs numbered two, three and seven of the last Will and testament of Jane E. Kickham, deceased, are valid.

Second. That the legatees and beneficiaries named in paragraphs two, three, four, five, six, seven, eight, nine and ten take, under paragraph twelve of said last Will and Testament of Jane E. Kickham, deceased, the residue and remainder of the estate, if any, in the proportions that said legacies bear to such residue and remainder.

Third. That the costs and expenses of this suit, as well as an attorney's fee of Five Hundred Dollars ($500) to the attorney of record representing the defendant shall be paid by the defendant administrator and allowed as a credit in the settlement of his accounts.

By the Court:

THOS. H. ANDERSON,
Justice.

From the foregoing decree complainants pray an appeal to the Court of Appeals, which is granted and the bond on appeal fixed at one hundred dollars ($100.00).

THOS. H. ANDERSON,
Justice.

15 *Memorandum.*

March 31, 1910.—Appeal bond filed.

Order for Extending Time.

Filed May 12, 1910.

Upon good cause shown this 12th day of May A. D. 1910, on motion of counsel for the defendant it is ordered:

That the time to file transcript of record on the appeal herein be and it is hereby extended to June 15, 1910, inclusive.

By the Court:

THOS. H. ANDERSON,
Justice.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 1, 1910.

The Clerk of said Court will please prepare Record for Appeal to Court of Appeals and include in the Record the following:

Amended Bill, Exhibit, Answer to Amended Bill, Decree construing will, Appeal, Bond, Extension.

WM. E. AMBROSE,
Attorney for Compl't.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27603, in Equity, wherein James Smith, et als. are Complainants and W. Gwynn Gardiner, Admr., c. t. a. of the estate of Jane E. Kickham, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of June, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2181. James Smith et al., appellants, vs. W. Gwynn Gardiner, administrator, &c. Court of Appeals, District of Columbia. Filed Jun- 14, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2181.

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER, and NELLIE MONTGOMERY, *Appellants,*

vs.

W. GWYNN GARDINER, Administrator, *Cum Testamento Annexo,* of the Estate of JANE E. KICKHAM, *Deceased.*

BRIEF ON BEHALF OF APPELLANTS.

WILLIAM E. AMBROSE,
Attorney for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2181.

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER, and NELLIE MONTGOMERY, *Appellants,*

vs.

W. GWYNN GARDINER, Administrator, *Cum Testamento Annexo,* of the Estate of JANE E. KICKHAM, *Deceased.*

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF CASE.

This is an appeal from a decree of the Supreme Court of the District of Columbia sustaining the validity of certain bequests contained in the last will and testament of one Jane E. Kickham, deceased, which bequests are as follows:

"Second. I give and devise and bequeath to James Gibbons, Cardinal, and Archbishop of Baltimore City, Maryland, all my shares of stock in the Georgetown Gas Light Company, for the use and benefit of the Roman Catholic Church, in his Archbishoprick.

"Third. I also give and bequeath to said Cardinal Gibbons, five hundred dollars for the use and benefit of St. Charles' College, in said (Baltimore)* Maryland, and near Ellicott's City. Said College belongs to said Roman Catholic Church or denomination.

"Seventh. I give and bequeath to said Cardinal Gibbons, as Archbishop, and to his successors in said office, five hundred dollars, for the use and benefit of the Roman Catholic Trinity Church in said Georgetown, as formerly called, in said District."

The paragraphs which are attacked and said to be declared invalid are the 2d, 3d and 7th of said will.

The basis of appellant's contention is the uncertainty of designation of, first the trustee under the will, second, the beneficiary and third the impracticability of distribution in the event of the happening of possible contingencies.

ARGUMENT.

The bequest to James Gibbons, Cardinal and Archbishop of Baltimore, Maryland, of stock in the Georgetown Gas Light Company for the use and benefit of the Roman Catholic Church in his Archbishopric is void.

1st. Because there is an attempt to give the stock referred to to James Gibbons, Cardinal and Archbishop of Baltimore City, Maryland, when in fact the Court will take judicial notice that James Gibbons, the Cardinal and Archbishop of the Roman Catholic Church is not James Gibbons, Cardinal and Archbishop of Baltimore, but of the Roman Catholic Church in America.

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*"Erased *in original* will."

2d. If the Court should find that the bequest in question was to James Gibbons as Cardinal then there is nothing in the bequest to show the purpose to which it should be applied in that it provides only that it shall be applied to the Roman Catholic Church in his bishopric.

Can the Court determine with any degree of certainty the purpose to which the bequest must be applied; where it must be applied, to wit, in Baltimore City or elsewhere or whether it is to be applied in the discretion of the said James Gibbons by forming a trust and applying the interest only or the principal or corpus of the estate.

There is no clause in said bequest where any person, individual church or the Roman Catholic Church as a body could in any way ask for or compel an accounting or in any other way determine who or for what purpose the said bequest or any part thereof were expended. There is no church designated with any degree of certainty.

The uniform course of decisions are to the end that a trust cannot be upheld unless it should be of such a nature that the *cestui que trustente* are defined and capable of enforcing the execution by proceedings in a Court of Chancery.

Church Executor M. E. Church vs. Smith, 56 Md., 397.

2 Perry on Trusts, 711.

Morris vs. Thompson, 19 N. J. Eq., 311.

Where the gift even to a charitable use is so indefinite as to be incapable of being executed by judicial decree the gift is void.

Stratton vs. Physio Med. Inst., 148 Mass., 505.

Colbert vs. Spear, 24th D. C. Appeals, 206, 208, 210.

A clause in a will which is in effect a mere authority to a third person to direct how a specific sum shall be disposed

of is inoperative and the sum named therein being a void bequest passes into the residue of the estate.

Briscoe vs. Bristol, 53 Conn., 242.
Baker vs. Fales, 16th Mass., 495.
Fontain vs. Ranevel, 17 Howard, 369, 382.
Barnable vs. Trippe, 75th Md., 252.

It is urged that paragraphs 3d and 7th of the will are in the same category with that of paragraph 2 and are subject to the same criticism effecting paragraph 2.

Therefore, in view of the foregoing, it is respectfully submitted that the decree below sustaining the validity of the bequests should be by this Court reversed.

WILLIAM E. AMBROSE,
Attorney for Appellants.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2181.

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER, AND NELLIE MONTGOMERY, APPELLANTS,

vs.

W. GWYNN GARDINER, ADMINISTRATOR, CUM TESTAMENTO ANNEXO, OF THE ESTATE OF JANE E. KICKHAM, DECEASED.

BRIEF ON BEHALF OF APPELLEE.

BENJAMIN S. MINOR,
HUGH B. ROWLAND,
L. RANDOLPH MASON,
Attorneys for Appellees.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2181.

JAMES SMITH, FRANCIS ULLMER, JAMES ULLMER, AND NELLIE MONTGOMERY, APPELLANTS,

vs.

W. GWYNN GARDINER, ADMINISTRATOR, CUM TESTAMENTO ANNEXO, OF THE ESTATE OF JANE E. KICKHAM, DECEASED.

BRIEF ON BEHALF OF APPELLEE.

Statement of Case.

This is an appeal from a decree of the Supreme Court of the District of Columbia sustaining the validity of certain bequests contained in the will of one Jane E. Kickham, deceased.

The paragraphs of the will which are attacked and sought to be declared invalid are the second, third and seventh of said will, namely:

> "Second. I give and devise and bequeath to James Gibbons, Cardinal and Archbishop of Baltimore City, Maryland, all my shares of stock in the George-

town Gas Light Company, for the use and benefit of the Roman Catholic Church, in his Archbishoprick."

"Third. I also give and bequeath to said Cardinal Gibbons, five hundred dollars for the use and benefit of St. Charles' College, in said (Baltimore) Maryland, and near Ellicott's City. Said College belongs to said Roman Catholic Church or demonination."

"Seventh. I give and bequeath to said Cardinal Gibbons, as Archbishop, and to his successors in said office, five hundred dollars, for the use and benefit of the Roman Catholic Trinity Church in said Georgetown, as formerly called, in said District."

The grounds urged by the appellants against the above provisions are found in the fifth paragraph of their bill (Rec., 2), and which are in effect that the said items of the will are void on the ground of uncertainty with reference to the designation of, first, the trustee; second, the beneficiary, and, third, the distribution in the event of the happening of certain contingencies.

ARGUMENT.

The Gifts Are Charitable Bequests.

That the bequests under consideration are charitable trusts, and should be construed as such seems beyond question.

"All gifts for the promotion of education are charitable in a legal sense."

Russell *vs.* Allen, 107 U. S., 163.
Perry on Trusts, sec. 700.
Spear *vs.* Colbert, 24 D. C. App., 187.

"The bequests for the benefit of religious denominations or for church buildings are charitable trusts."

Perry on Trusts, sec. 701.
Earle *vs.* Wood, 8 Cushing, 430.
In re Appeal of Mack, 41 Atl. Rep., 242.
Twele *vs.* Bishop of Derry, 168 Mass., 341.

The will is not invalid because of uncertainty in the designation of a trustee and his successor.

Assuming that a trustee has not been designated with certainty, as contended by the appellants, it is well established that courts of equity will not permit a valid gift for charitable purposes, the general nature of which is described, to fail for want of a trustee.

> "If a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain or indefinite, indeed it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. * * * It is said that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault and protect them from abuse."
>
> Perry on Trusts, sec. 687.
> Frontaine *vs.* Ravanel, 17 How., 384.
> Russell *vs.* Allen, 107 U. S., 165.

> "In the first place, trusts are often created by a will without the designation of any trustee to execute them, or it may be a matter of doubt under the terms of the will who is the proper party. Now, it is a settled principle in courts of equity that a trust shall never fail for want of a proper trustee; and if no other is designated courts of equity will take upon themselves the execution of the trust."
>
> Story's Equity, vol. 2, sec. 1059.

In the case of Wood *vs.* Payne, 66 Fed. Rep., 807, the court in upholding the will quotes with approval the langauge of Chief Justice Durfee, of the Rhode Island Supreme Court, in the case of Pell *vs.* Mercer, 14 R. I., 412, on the question of charitable trusts, as follows:

> "Though indefinite it is upheld. If it is designated to be perpetual it is perpetuated. It is a mat-

> ter of public policy to conserve it from failure. * * * A court of chancery * * * does not permit the trust to fail because its particular purposes are uncertain but furthers the general intent of the donor by defining them."

An omission to name trustees or the death or declination of the trustees named will not defeat the trust, but the court will appoint new trustees in their stead.

> Jones *vs.* Haversham, 107 U. S., 174.
> Spear *vs.* Colbert, 24 D. C. App., 187, affirmed in 200 U. S., 130.
> Russell *vs.* Allen, 117 U. S., 167.
> Adler *vs.* Hopkins Academy, 14 Pick. (Mass.), 240.
> Phillips *vs.* Harrow, 91 Ia., 92.
> Iglehart *vs.* Iglehart, 26 D. C. App., 209.

It seems clear therefore, in the light of the authorities above quoted, even though no trustee is designated and no successors of the trustee are specifically provided for, as contended for by the appellants, yet the charitable trusts created under the provisions of this will will not be permitted by a court of equity to fail for want of a trustee.

Trustees Sufficiently Designated.

The objection raised, however, by the appellants as to the uncertainty in the designation of a trustee and his successor is not warranted by the language of the will, for the reason that a trustee is named and with sufficient certainty, as is also his successor in trust, namely, James Gibbons, Cardinal, and Archbishop of Baltimore city, Maryland, and his successors in said office. In paragraph two of said will the testatrix bequeaths to "James Gibbons, Cardinal, and Archbishop of Baltimore city, Maryland;" the bequest in the third paragraph of said will is to "*said* Cardinal Gibbons;" and the bequest in the seventh paragraph of said will is to

"*said* Cardinal Gibbons, as Archbishop, and to his successors in said office."

Reading these three provisions of the will together, it seems clear that it was the intention of the testatrix to constitute and appoint James Gibbons, in his official capacity as Cardinal, and Archbishop of Baltimore city, Maryland, and his successors in said office, whoever they might be, the trustee in respect to the trusts created by her. In paragraph seven the testatrix names, as trustee in respect to the gift therein bequeathed, "*said* James Gibbons, as Archbishop, and to his successors in said office," meaning thereby, it would seem, the same person named as trustee in paragraphs two and three, namely, James Gibbons, not in his individual capacity, but in his official capacity as "Cardinal, and Archbishop of Baltimore city, Maryland"—the official head of the Catholic Church or denomination, and the person best fitted, by reason of his office, to carry into effect the wishes of the testatrix in respect to said bequests.

The bequests are not invalid because of uncertainty in the naming of beneficiaries or for failure to designate the manner of distribution.

The will is to be construed with reference to the intention of the testatrix, as shown by the context of the entire instrument. This is elementary and needs no authority to support it.

Applied to the bequests in this case it is apparent that the assumption that no beneficiaries have been designated is not warranted by the language used. It seems clear that the intention of the testatrix in respect to the bequests contained in the paragraphs above referred to is to promote religious worship as advocated by the Roman Catholic Church. A bequest in the nature of a public charity cannot name each individual who is to be benefited thereby. It is sufficient definiteness to name communities and institutions.

The beneficiaries named in the will are the Roman Catholic Church (within the archbishopric of Cardinal Gibbons), St. Charles College, Baltimore, Maryland (belonging to the Roman Catholic Church or denomination), and the Roman Catholic Trinity Church in Georgetown, District of Columbia. The bequests are for the purpose of promoting the Roman Catholic Church and its institutions and the language used to convey the testatrix' intention in this respect is specific and definite.

Even though the intention of the testatrix as to the beneficiaries is indefinitely expressed, yet it is immaterial according to the settled law of the United States in respect to charitable trusts.

> "Uncertainty in the object is one of the characteristics of a true, technical, charitable use, because if the beneficiaries are defined with precision, the ordinary doctrines of equity * * * would be sufficient to support it."
>
> Bispham's Equity, sec. 116, 5th edition.

> "The instrument creating them (charitable trusts) should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death, or declination of the trustees named will not defeat the trust, but the court will appoint new trustees in their stead."
>
> Russell *vs.* Allen, 107 U. S., 163.

See also—

John *vs.* Smith, 91 Fed. Rep., 827.
Ould *vs.* Hospital, 95 U. S., 303.
Jackson *vs.* Phillips, 14 Allen, 571.

In People *vs.* Cogswell, 45 Pac. Rep., 270, a trust was created naming as the beneficiaries thereof "the boys and girls of California," and it was urged that the will was void for uncertainty. The court in sustaining the will uses the following language:

> "It should scarcely be necessary to observe that when the class has been designated, its very vagueness, uncertainty and indefiniteness as to individuals and numbers is a necessary and essential element to the creation of a valid charitable trust."

In Tichenor *vs.* Brewer's Executors, 98 Ky., 349, a devise was made to "the Roman Catholic Bishop of the city of Louisville, to be by him used for the benefit of the Roman Catholic charitable institutions in his diocese." The will was attacked upon the ground of indefiniteness as to the beneficiary. The court in sustaining the will says:

> "Often, in this court, terms more latitudinous and general have been held sufficient designations of the objects of the testatrix' bounty to uphold and substantiate devises."

In St. James Orphan Asylum *vs.* Shelby, 60 Nebr., 796, there was a bequest to "Right Reverend James O'Conner, Bishop of Omaha, if he shall survive me, the following lands, etc.; if the said Bishop O'Conner does not survive me, then my will is that the said lands shall go to his successor as Bishop of Omaha, my wish and direction is that the said Bishop O'Conner, if he shall survive me, or his said successor as Bishop of Omaha, apply the said lands and the proceeds arising from the same and the sale thereof to some charity, according to his judgment, but I prefer that the same be applied to the establishment or maintenance of an orphanage."

The court, in sustaining the will, uses the following language:

> "The provision of the will under construction is a model of clearness and conciseness of expression, and freedom from ambiguity or uncertainty in the meaning of the language used to denote the testator's will and intention. * * * It is clearly certain who the trustee is and the bequest is made for a charitable purpose. While a preference is expressed, the objects of the charity from which the selection is to be made are of the most general character. Is the devise to fail for that reason alone? * * * In determining the question of the validity of a bequest, we should be mindful of the rule that courts view favorably the donation by will for charitable purposes and will endeavor to carry them into effect where the same can be done consistently with the rules of law. * * * This contract, like all others, must be construed with a view to carrying out the intention of the testator, and unless there is something in it contrary to the laws of the State, or in contravention of public policy, no reason exists for declaring it invalid. The object of the trust is clearly charitable and is specific as such in so many words. * * * Its invalidity can be declared only by the adoption of a doctrine at variance with the great weight of authority, to wit, that the beneficiaries shall be so certain that they may come into court claiming the benefit of the trust, and demand its execution. We do not think this doctrine should be adopted in this State."

See also—

HcAlister *vs.* Burgess, 37 N. E., 173.
Going *vs.* Emery, 16th Pick., 107.
Sowers *vs.* Cyrenius, 39 Ohio State, 29.
Hunt *vs.* Fowler, 121 Ill., 269.
Harrington *vs.* Pier, 105 Wis., 485.
Grant *vs.* Saunders, 121 Ia., 80.
Power *vs.* Cassidy, 79 N. Y., 602.
Suter *vs.* Hilliard, 132 Mass., 412.
Beadsley *vs.* Selectmen, 53 Conn., 489.

The failure to designate the manner of distribution, should the trustees named refuse to accept the trust, does not invalidate the bequest.

One of the grounds assigned by the appellants for declaring the will invalid is that no provision is made by the testatrix for the distribution of the fund in question in case of the failure of the trustee to accept the trust, or accepting the trust fail to distribute the fund during his lifetime.

To constitute a valid charitable trust it is not necessary to name the beneficiaries with such degree of certainty as to enable them to invoke judicial aid in demanding its execution. Indeed, such certainty as to beneficiaries is inconsistent with the nature of a trust for charitable purposes.

Orphan Asylum *vs.* Shelby, 6 Neb., 796.
Harrington *vs.* Pier, 105 Wis., 485.

Should the trustee refuse to execute the trust, it is fully within the power of the equity court to assume control of the fund and to devote it to lawful objects of charity most nearly correspondent to those for which it was originally intended.

Mormon Church *vs.* U. S., 136 U. S., 1.

Therefore, in view of the foregoing, it is respectfully submitted that the decree below sustaining the validity of the bequests should be by this court affirmed.

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